No. 15,394

IN THE

United States Court of Appeals

For the Ninth Circuit

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellant,

vs.

KURT RIETMANN,

Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF OF APPELLANT.

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JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court was invoked under Title 28 U.S.C. 2241, which provides in part as follows:

> "(a) Writs of habeas corpus may be granted by . . . the District Courts . . . within their respective jurisdictions.
>
> * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States . . .;"

The jurisdiction of the Court of Appeals arises under Title 28 U.S.C. 2253, which provides in part as follows:

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had . . .".

STATEMENT OF THE CASE.

The material facts of the case are alleged in the petition and are admitted by the Answer. They are briefly set forth in the Order of the Court below granting the petition for writ of habeas corpus.

Kurt Rietmann, the appellee herein, is a citizen of Switzerland. He first entered the United States when on July 1, 1949 at New York he was admitted as a permanent resident. On March 19, 1951 he applied for and was granted relief from training for service in the Armed Forces of the United States under Sec. 4 of the Selective Service Act of 1948, 50 U.S.C. Appendix 454, which provided that resident aliens might apply for exemption from military service, but if they did so, they would thereafter be debarred from citizenship.[1] On April 1, 1955, preparatory to a con-

[1]Selective Service Act of 1948 was amended June 14, 1951, 64 Stat. 1073, to make aliens admitted for permanent residence liable for military service without the privilege of applying for exemption on the ground of alienage.

templated trip to Switzerland, appellee, upon his application therefor, was issued a reentry permit by the Immigration and Naturalization Service. He thereafter departed the United States and went to Switzerland. Upon his return to the United States on September 27, 1955, he was denied admittance under the Immigration and Nationality Act of 1952 as an immigrant alien ineligible for citizenship. Pending the outcome of exclusion proceedings, he was paroled into the United States and permitted to proceed to San Francisco, where the proceedings were thereafter conducted. He was held excludable under Section 212(a)(22) of the 1952 Immigration and Nationality Act, as an alien permanently ineligible to become a citizen under Section 315(a) of the said Act. An appeal to the Board of Immigration Appeals was dismissed on February 13, 1956. A motion to reconsider was denied by the Board of Immigration Appeals on June 13, 1956, and on August 3, 1956 the petition for habeas corpus alleging that the Immigration and Naturalization Service erred in finding that he was an excludable alien was filed. An order to show cause issued and the case was submitted on the Immigration and Naturalization Service record of the exclusion proceedings. The Court below granted the petition for writ of habeas corpus and by order dated November 8, 1956 issued the writ of habeas corpus and discharged appellee from the custody of appellant.

The Court will note that the issue of this case is raised by petition for writ of habeas corpus as distinguished from a petition for review or a complaint

for declaratory judgment. Absent the detention of appellee, the issue may have been raised by an action for declaratory judgment. The relief sought does not challenge the sufficiency of the evidence nor the fairness of the hearing, but rather asks the Court to determine appellee's status as a matter of law. Present the detention, the petition for habeas corpus may seek review of the proceedings or the determination of status.

QUESTION PRESENTED.

The question presented concerns the effect of the Savings Clause, Sec. 405(a) of the Immigration and Nationality Act of 1952 upon appellee's status as an immigrant alien ineligible to citizenship when he sought admission to the United States in 1955. Does Sec. 405(a) save to appellee the provision of Sec. 13(c) of the 1924 Act.

STATUTES INVOLVED.

Immigration and Nationality Act of 1952 (8 U.S.C. 1101 et seq.):

> "Section 101. (a) (8 U.S.C. 1101(15), (19) (27)).
>
> * * * *
>
> (15) The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—"
>
> * * * *
>
> (Appellee is not a nonimmigrant alien.)

(19) The term 'ineligible to citizenship', when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

* * * *

(27) The term "non quota immigrant" means—

* * * *

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad; * * *"

"Section 212. (a) (8 U.S.C. 1182(a)).

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * *

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens

and who seek to reenter the United States as nonimmigrants;''

Section 241(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1251(a):

''(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;'' e.g. Sec. 212(a)(22).

* * * *

''(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) 'That any such alien entered the United States prior to the date of enactment of his act, or' (2) that the facts, by reason of which such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.''

Section 315 of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1426:

''(a) Notwithstanding the provisions of Section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces * * * on the ground that he is an alien, and is or was relieved or discharged from such training on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System * * * shall be conclusive as to whether an alien was relieved * * * from such liability for training or service because he was an alien."

Section 405(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1101 Note:

"Savings Clause

Sec. 405. (a) Nothing contained in his Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa . . ."

Section 19(a) of the Immigration Act of 1917, 8 U.S.C. Section 155(a) (1946 ed.):

> "At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law (e.g. former 8 U.S.C. 213(c)) * * * shall, upon the warrant of the Attorney General, be taken into custody and deported."

Section 13(c) of the Immigration Act of 1924, 8 U.S.C. Sec. 213(c):

> "No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant * * *."

Section 3 of the Immigration Act of 1924, 8 U.S.C. Sec. 203:

> "When used in this chapter the term 'immigrant' means any alien departing from any place outside the United States destined for the United States . . ."

Section 4 of the Immigration Act of 1924, 8 U.S.C. Sec. 204:

> "When used in this Act the term 'nonquota immigrant' means—
>
> . . . (b) an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad; * * *"

Section 3(a) of the Selective Training and Service Act of 1940, 55 Stat. 844, 845:

> "Except as otherwise provided in this Act, every male citizen of the United States and every

other male person residing in the United States, who is between the ages of twenty and forty-five * * * shall be liable for training and service in the land and naval forces of the United States: *provided,* that any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application "to be relieved from such liability in the manner prescribed by and in accordance with the rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *."

Section 4(a) of the Selective Service Act of 1948, 62 Stat. 604-606:

"(a) Except as otherwise provided in this title, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and twenty-six, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to Section 3 of this title, shall be liable for training and service in the armed forces of the United States. Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the Presi-

dent; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

SUMMARY OF ARGUMENT.

Appellee is an immigrant alien who in 1951 had been lawfully admitted to the United States as a permanent resident. In April, 1955, being then ineligible to citizenship, he departed the United States for Switzerland. At the time of his original admission in 1951, Sec. 13(c) of the 1924 Act gave to an alien ineligible to citizenship an admissible status as a nonquota immigrant when returning from a temporary visit abroad. Sec. 13(c) was repealed by the 1952 Act effective December 24, 1952. In 1955 when appellee departed the United States and sought readmission upon his return, as an immigrant alien ineligible to citizenship he was no longer admissible as a nonquota immigrant, but could only be admitted as a nonimmigrant under Sec. 212(a)(22). He does not seek admission as a nonimmigrant. Appellant contends that appellee as an immigrant alien ineligible to citizenship has no status under the repealed statute which could be saved by Sec. 405(a).

ARGUMENT.

Appellee is an immigrant alien. He had been lawfully admitted to the United States as a permanent resident in 1949. In March of 1951 he made application for and was relieved from service in the Armed Forces of the United States on the ground of alienage. Under Sec. 4(a) of the Selective Service Act of 1948 and Sec. 315 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1426, he thereby became permanently ineligible for citizenship. Appellee has advanced no objection to the irregularity of his application for and the granting of exemption from military service. The court below therefore properly found that "he is an alien ineligible for citizenship." (Tr. p. 10.)

Under Sec. 4(b) of the Immigration Act of *1924* an immigrant alien previously lawfully admitted to the United States returning from a temporary visit abroad is included within the meaning of the term "nonquota immigrant." Under Sec. 13(c) of the *1924 Act,* an immigrant alien ineligible to citizenship could be admitted if "admissible as a nonquota immigrant."

Under Sec. 212(a)(22) of the *1952 Act,* an alien ineligible for citizenship is only admissible as a "nonimmigrant."

The court below found (Tr. p. 9):

> "It is conceded that petitioner, as a returning alien, previously admitted for permanent residence, has a status of an immigrant alien. Immigration and Nationality Act of 1952, Sec. 101(15), 8 U.S.C. 1101 (15)."

Section 4 and Section 13 of the 1924 Act were repealed by the 1952 Immigration and Nationality Act (Sec. 403). As an immigrant alien ineligible to citizenship, appellee can only be admitted to the United States as a "nonimmigrant" under Sec. 212(a)(22) of the 1952 Act.

The appellee contended to the court below that he is not excludable under Sec. 212 of the 1952 Act "as an immigrant alien ineligible for citizenship, because the Savings Clause of that Act, Sec. 405, preserves the nonexcludable status he had under the prior law." (Tr. p. 10). In reaching the conclusion that appellee did have a nonexcludable status preserved by the Savings Clause, the court below reasoned as follows:

> "Thus under the statute in force prior to the 1952 Act, petitioner had a status as a resident alien enabling him to depart the United States on temporary visits abroad and return, even though he was ineligible for citizenship."

There is nothing in the immigration and nationality statues in effect *prior* to 1952 establishing a status in a resident alien ineligible to citizenship permitting him to depart the United States on visits abroad and to reenter as of course upon return. A resident alien, who had departed from the United States, became an immigrant alien when he sought to reenter the United States to resume his residence. If he had been previously lawfully admitted to the United States and was returning from a temporary visit, he was classified as a nonquota immigrant under Sec. 4 of the 1924 Act. Under Sec. 13(c) of the 1924 Act,

he was admissible as a nonquota immigrant if he was not otherwise excludable under then existing law.

Shaughnessy v. U. S. ex rel Mezei, 345 U. S. 206;

United States ex rel Volpe v. Smith, 289 U. S. 422;

Schoeps v. Carmichael, 177 F.2d 391.

Under Sec. 101(a)(27)(B) of the 1952 Act, appellee, as an immigrant alien, is within the classification of a nonquota immigrant, but Sec. 13(c) of the 1924 Act having been repealed, he is no longer admissible as a nonquota immigrant. He may only be admitted if he seeks to enter as a nonimmigrant under Sec. 212(a)(22) of the 1952 Act. Appellee does not seek to enter as a nonimmigrant. As a nonquota immigrant alien ineligible to citizenship appellee is subject to the exclusion provision of Sec. 212(a) of the 1952 Act. The effect of the decision of the court below in invoking Sec. 405 of the 1952 Act, the Savings Clause, is not to save to appellee a status, but to continue the effect of Sec. 13(c) of the 1924 Act as permitting a nonquota immigrant alien ineligible to citizenship to be admitted to the United States as a nonquota immigrant, notwithstanding the repeal of Sec. 13(c).

The court below held:

> "In my opinion, the Savings Clause of the 1952 Act is sufficiently broad to preserve this status (as a resident alien). I do not read it as being limited to the preservation of inchoate rights in the process of acquisition as did the court in *Paris v. Shaughnessy,* 138 F. Supp. 361 (S.D.

N.Y. 1956) relied upon by the Government. The Savings Clause is an exceptionally sweeping one designed for a statute which constituted a complete revision of our immigration law. It should be applied, as was obviously intended, to forestall the deprivation of a status gained under prior law, unless it clearly appears that Congress had a contrary intent. There is no reason to believe that the Congress wished to suddenly circumscribe the movement of resident aliens who theretofore had been free to leave the United States temporarily and return."

The fallacy of the opinion is one of substitution of terms. Appellee was found to be an "immigrant alien." The term "resident alien" was substituted for that of "immigrant alien" and a "status as a resident alien" was then attributed to appellee which the court held was saved. Congress clearly acted to deprive an "immigrant alien", ineligible to citizenship, who had previously been admitted to permanent residence, of the privilege of reentering the United States as a "nonquota immigrant" by repealing the statutory authority therefor. No clearer expression of Congressional intent can be suggested.

The power of Congress to prescribe the terms and conditions upon which aliens may enter or remain in the United States is no longer open to serious question.

United States ex rel. Volpe v. Smith, 289 U.S. 422;

Turner v. Williams, 194 U.S. 279;

Bugajewitz v. Adams, 228 U.S. 585;

Low Wah Suey v. *Backus,* 225 U.S. 460.

"For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws. E.G. *Lem Moon Sing v. U.S.,* 158 U.S. 538, 547-548 (1895); *Polymeris v. Trudell,* 284 U.S. 279 (1932)."

Shaughnessy v. U.S. ex rel. Mezei, 345 U.S. 206, 213.

"Whatever our individual estimate of that policy and the fears on which it rests, respondents right to enter the United States depends on the Congressional will, and courts cannot substitute their judgment for the legislative mandate. *Harisiades v. Shaughnessy,* 342 U.S. 580, 590-591 (1952)."

Shaughnessy v. U.S. ex rel. Mezei, supra, p. 216.

From *Knauff v. Shaughnessy,* 338 U.S. 537, page 542, the following is quoted:

"At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides."

Nishimura Ekiu v. U.S., 142 U.S. 651, 659;

Fong Yue Ting v. U.S., 149 U.S. 698, 711.

and also from page 542 of the *Knauff* case:

> "The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304; *Fong Yue Ting v. United States,* 149 U.S. 698, 713. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power."

The attention of the Court below was directed by appellant to the fact that Congress had made some provision for a returning immigrant alien. Section 405(a) of the 1952 Act contains the sentence: "When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of the visa." In 1955, appellee herein had obtained a permit to reenter the United States. For purposes of entry, a reentry permit is the equivalent of an immigration visa.[2]

United States ex rel. Polymeris et al. v. Trudell, 284 U.S. 279;

Rederiaktiebolaget Nordstjernen v. U.S., 61 F. 2d 808 (9th Cir. 1932).

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[2]Incorrectly stated by the court below, inversely. (Tr. p. 12.)

Congress having specifically saved the provision of the law in effect on the date of issuance of an immigration visa, if issued prior to the effective date of the 1952 Act, and if unexpired, must necessarily have intended that the immigrant alien in possession of a reentry permit (immigration visa) issued after the effective date of the 1952 Act is subject to the 1952 Act. The court below recognized this conclusion, but avoided the effect of it by holding (Tr. p. 12):

> "But assuming the validity of this conclusion, since the Savings Clause is part of the 1952 Act, the net result still is that the Savings Clause is determinative that petitioner is admissible."

The identical question was presented to the District Court for the Southern District of New York in *Paris v. Shaughnessy,* 138 F. Supp. 36. Judge Dawson in his opinion reached the opposite conclusion to that of the court below herein. At page 41, Judge Dawson held:

> "Therefore, the right of petitioner to enter the United States in 1953 was to be determined by the law existing at the time of that entry; and the law at the time of that entry was that aliens ineligible to citizenship 'shall be excluded from admission into the United States.' "

and on page 42:

> "The Savings Clause by its very terms, does not continue a right to enter and reenter the country, irrespective of a change in the law, for it is not one of the categories specifically referred to in the Savings Clause. The language of the Savings Clause clearly indicates that all that is

preserved by that clause are inchoate rights in process of determination or acquisition."

Judge Goodman in his opinion (Tr. p. 11) referred to the *Paris* case and particularly the last sentence of the immediately preceding quotation by saying:

> "In my opinion the Savings Clause of the 1952 Act is sufficiently broad to preserve this status. I do not read it as being limited to the preservation of inchoate rights in the process of acquisition as did the court in *Paris v. Shaughnessy,* 138 F. Supp. 36 (S.D. N.Y. 1956) relied upon by the Government."

The *Paris* case has been appealed to the Court of Appeals for the Second Circuit, and appears as *Paris v. Shaughnessy,* No. 24017. Briefs have been filed and argument completed. Appellant is not as yet informed of a decision.

Referring again to the comment of the court below regarding the Paris opinion:

> "I do not read it (Sec. 405(a)) as being limited to the preservation of inchoate rights in process of acquisition as did the court in *Paris v. Shaughnessy.*"

In the view of appellant herein, any question as to the limitations of Section 405(a) is not reached. Appellee is an immigrant alien seeking to enter the United States. His entry is to be determined under the provision of the 1952 Act. Unless he is in possession of an unexpired immigration visa issued prior to the effective date of the 1952 Act, Sec. 405(a) is not applicable to him.

CONCLUSION.

Appellant respectfully submits that the court below erred in granting and issuing the writ of habeas corpus and in discharging appellee from the custody of appellant. The order of the court below issuing the writ and discharging appellee should be reversed, the writ discharged, the petition dismissed and the appellee remanded to the custody of appellant.

Dated, San Francisco, California,
April 5, 1957.

Respectfully submitted,

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